Kwong Hing Sauce Factory v Pengarah Tanah dan Galian Wilayah Persekutuan Kuala Lumpur

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO 12ANCvC-50–02 OF 2014
ROSILAH YOP JC
6 JUNE 2014

Civil Procedure — Appeal — Stay of execution — Appeal not to operate as stay of execution — Applicant to prove special circumstances — Dispute regarding ownership of land — Appellant seeking to prevent respondent from demolishing appellant's factory the land pending appeal — Whether demolition works would effectively deprive appellant of results of appeal — Whether constituting special circumstances justifying granting of stay of execution

The appellant had instituted a suit in the sessions court ('SC') on the premise that it had an equitable license to occupy the government land held under the description of Lot 58481, Mukim Kuala Lumpur since 1948 ('the land'). The appellant's occupation on the land under temporary occupation license ('TOL') had expired in 2010. The appellant's application for the land to be alienated to them was rejected by the respondent. The SC had allowed the respondent's application to strike out the appellant's claim. The appellant appealed against the said decision. While the appeal was still pending at the High Court, the respondent, with about 30 officers from the DBKL and the police, came to the land with bulldozers to demolish the appellant's factory pursuant to the SC's judgment. The respondent had damaged part of the appellant's factory gate and fences. The appellant thus filed the present application for a stay of execution of the SC's judgment until the disposal of the appeal.

Held, allowing the application:

(1) The general rule is that an appeal shall not operates as a stay of execution unless the court so orders (see para 8).

(2) In an application for stay of execution, the onus is on the appellant to demonstrate the existence of special circumstances to justify the grant of a stay. The reasons must relate to the enforcement of the judgment (see para 21).

(3) The respondent did not file an affidavit to reply to the appellant's affidavit. Therefore it was deemed that the respondent had admitted to the appellant's averments (see para 12).

(4) The demolition works would effectively deprive the appellant of the

results of the appeal. The main gate and fences to the factory had been damaged and assuming that the demolition was effected, the appellant would suffer losses and the subject matter of the appeal would be demolished. In doing so, the execution of the order would destroy the subject matter of the action and deprive the appellant of the means of the appeal. This, constituted special circumstances which justified the granting of a stay of execution pending the disposal of the appellant's appeal (see para 26).

[Bahasa Malaysia summary

Perayu telah memulakan tindakan di mahkamah sesyen ('MS') atas asas bahawa ia mempunyai lesen berekuiti untuk tinggal di tanah kerajaan yang dipegang di bawah Lot 58481, Mukim Kuala Lumpur sejak tahun 1948 ('tanah'). Penempatan perayu di atas tanah tersebut di bawah lesen penempatan sementara ('LPS) telah tamat tempoh pada tahun 2010. Permohonan perayu untuk tanah akan dipindahkan kepada mereka ditolak oleh responden. MS telah membenarkan permohonan responden untuk membatalkan tuntutan perayu. Perayu merayu terhadap keputusan tersebut. Sementara rayuan masih belum didengar di Mahkamah Tinggi, responden dengan lebih kurang 30 pegawai daripada DBKL dan polis, memasuki tanah tersebut dengan jentolak untuk meruntuhkan kilang perayu berikutan penghakiman MS. Perayu oleh itu memfailkan permohonan ini untuk penangguhan pelaksanaan penghakiman MS sehingga pelupusan rayuan tersebut.

Diputuskan, membenarkan permohonan:

(1) Peraturan am adalah bahawa rayuan tidak patut beroperasi sebagai penangguhan pelaksanaan kecuali mahkamah perintahkan (lihat perenggan 8).

(2) Dalam permohonan untuk penangguhan pelaksanaan, beban adalah ke atas perayu untuk menunjukkan kewujudan keadaan khas untuk menjustifikasikan pemberian penangguhan. Alasan mesti berkaitan kepada penguatkuasaan penghakiman (lihat perenggan 21).

(3) Responden tidak memfailkan afidavit untuk menjawab afidavit perayu. Oleh itu ia dianggap bahawa responden telah mengaku kepada penghujahan perayu (lihat perenggan 12).

(4) Kerja-kerja runtuhan akan secara efektif menafikan perayu keputusan rayuan. Pintu pagar dan pagar utama kilang tersebut telah rosak dan dengan menganggap bahawa kerja-kerja runtuhan dijalankan, perayu akan menanggung kerugian dan perkara rayuan akan dipatahkan. Dengan berbuat sedemikian, pelaksanaan perintah akan memusnahkan perkara tindakan dan menafikan perayu dengan tujuan rayuan tersebut. Ini, membentuk keadaan khas yang menjustifikasikan pemberian

penangguhan sementara menunggu pendengaran rayuan perayu (lihat perenggan 26).]

Notes

For cases on stay of execution, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1789–1800.

Cases referred to

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257; [2003] 4 CLJ 1, FC (consd)

Overseas Investment Pte Ltd v Anthony William O' Brien & Anor [1988] 3 MLJ 332, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 73
National Land Code ss 48, 418(1)
Rules of Court 2012 O 55 r 16
Subordinate Courts Act 1948 s 69

Keppy Wong (Nizi Shazril bin Ithnin with him) (Keppy Wong & Assoc) for the appellant.

Cindy Jasmine (Nivashini Dwi Sharmalingam with her) (Federal Counsel, Attorney General's Chambers) for the respondent.

Rosilah Yop JC:

ENCLOSURE 4

[1] This is an application by the appellant for, amongst others, an order to stay the execution of the sessions court judgment dated 27 January 2014 in Suit B51-41–11 of 2013 until the disposal of the appeal of the Civil Appeal No 12ANCvC-50–02 of 2014.

BRIEF FACTS

[2] The appellant has instituted a suit in the sessions court on the premise that they have an equitable license to occupy the government land held under the description of Lot 58481, Mukim Kuala Lumpur since 1948.

[3] The appellant occupation on the land under temporary occupation license ('TOL') had expired in 2010. The appellant's application for the land to be alienated to them was rejected by the respondent in September 2010, on the grounds that the land had been reserved for public purpose ie a Chinese temple.

[4] The appellant continued to remain on the said land despite being given a notice dated 23 September 2013 to vacate the land.

[5] At the sessions court, the respondent applied to strike out the appellant's suit. The application was heard before the sessions court and the learned sessions judge allowed the respondent's application and struck out the appellant's claim.

[6] The appellant filed a notice of appeal against the said decision. The appeal is still pending at the High Court.

[7] While the appeal is still pending at the High Court, the respondent had on 28 April 2014 with about 30 officers from the DBKL and the police came to the appellant's factory at the said TOL land with bulldozers to demolish the factory pursuant to the the sessions court judgment dated 27 January 2014. On the same date the respondent had damaged part of the appellant's factory gate and fences by using machines.

THE LAW

[8] The general rule is that an appeal shall not operates as a stay of execution unless the court so orders — see s 73 of the Courts of Judicature Act 1964, O 55 r 16 of the Rules of Court 2012, *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1 (FC).

[9] It is trite that, in an application for stay of execution, the onus is on the appellant to demonstrate the existence of special circumstances (*Kosma Palm Oil Mill*) to justify the grant of a stay. It is trite that the reasons must relate to the enforcement of the judgment.

[10] In order for me to consider this stay application, the appellant is required to prove by affidavit evidence that there are special circumstances which warrant a stay order. What constitutes special circumstances would depend on the facts of the case.

WHETHER SPECIAL CIRCUMSTANCES ESTABLISHED?

[11] In considering whether special circumstances were established, the court considered the affidavit in support filed by the appellant and written submissions filed by the parties. The respondent did not file any affidavit to reply to the appellant's affidavit.

THE APPELLANT'S SUBMISSION

[12] The respondent did not file the affidavit to reply to the appellant's affidavit. Therefore it is deem that the respondent had admitted to the appellant's averments.

[13] On 28 April 2014, the respondent had demolished part of the appellant's factory by using the bulldozer.

[14] The appellant submitted that they have a license coupled with equity in occupying the said TOL land.

[15] The subject matter is the ketchup factory erected on the said TOL land. If the said factory is demolished, then the appellant's appeal will be rendered nugatory.

[16] The appellant will suffer serious losses if the stay is not granted.

THE RESPONDENT'S SUBMISSION

[17] The appellant has failed to show any special circumstances that warrant a stay of the order pending the disposal of the appellant's appeal to the High Court.

[18] The appellant has no prospects of succeeding in their appeal because of ss 48 and 418(1) of the National Land Code and s 69 of the Subordinate Courts Act 1948.

[19] The balance of convenience does not lie in the appellant's favour. This application is an attempt by the appellant to deprive the respondent of the fruits of their litigation.

FINDINGS OF THE COURT

[20] Relying on the above principles enunciated by the Federal Court in *Kosmo Palm Oil*, the court considered whether the appellant has established any special circumstances to justify a stay order.

[21] In this application, the respondent did not file any affidavit to reply to the appellant's affidavit.

[22] In the case of *Overseas Investment Pte Ltd v Anthony William O' Brien & Anor* [1988] 3 MLJ 332, the court held as follows:

Where a case is to be decided on a contest of affidavits, the rule is clear. Material allegations which are not contradicted are deem to be admitted.

[23] The appellant in his supporting affidavit affirmed on 28 April 2014 at paras 5–6 stated as follows:

> 5 Walau bagaimanapun, Responden telah pada hari ini bersama dengan kira-kira 30 anggota penguatkuasa Dewan Bandaraya Kuala Lumpur dan pasukan polis telah datang ke premis perniagaan Perayu dengan mesin jentolak untuk merobohkan kilang kicap Perayu atas alasan Mahkamah Sesyen Kuala Lumpur telah membatalkan Writ Saman Perayu pada 27.1.2014.
>
> 6 Apabila saya memaklumkan rayuan ke Mahkamah Tinggi masih belum didengar dan akan dibicarakan pada 19.5.2014, mereka masih enggan menangguhkan perobohan dan telah merosakkan sebahagian pagar dan pintu depan utama kilang saya dengan menggunakan jentera.

[24] These material facts evidence was never challenged by the respondent. Hence, failure to challenge this material facts amounts to the acceptance of the appellant's testimony.

[25] The intended demolition of the appellant's ketchup factory relate to the execution of the order in question. If a stay of execution order is not granted, how would it make the appeal if successful, nugatory?

[26] I am of the considered opinion that the demolition works would effectively deprive the appellant of the results of the appeal. The main gate and fences to the factory has been damaged and assuming that the demolition is effected, the appellant will suffer losses and the subject matter of the appeal will be demolished. In so doing, the execution of the order would destroy the subject matter of the action and deprive the appellant of the means of the appeal. This, in my view constitute special circumstances which justifyng the granting of a stay of execution pending the disposal of the appellant's appeal.

[27] Based on the above, the application by the appellant is hereby allowed.

Application allowed.

Reported by Kanesh Sundrum